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No. 58296-8-1

COURT OF APPEALS,

DIVISION I,
OF THE STATE OF WASHINGTON

SEATTLE HOUSING AND RESOURCE EFFORT/WOMEN'S HOUSING EQUALITY AND ENHANCEMENT PROJECT, a Washington Non-Profit Corporation; and NORTHSHORE UNITED CHURCH OF CHRIST, a Public Benefit Corporation,

Appellants,

v.

CITY OF WOODINVILLE, a Municipal Corporation,

Respondent/Cross-Appellant.

RESPONDENT/CROSS-APPELLANT CITY OF WOODINVILLE'S RESPONSE AND OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Assignments of Error

a. Conclusion of Law 3.3 of the "Final Order".

The court erred in concluding that: *The strict scrutiny standard applies to the court's analysis of the Woodinville Zoning code provisions applicable to the R-1 zone and the Moratorium Ordinance in these circumstances.*

b. The granting of the Temporary Restraining Order on May 12, 2006 allowing the Tent City IV encampment on church property until the preliminary injunction hearing and the Orders continuing the TRO granted on May 30, June 2, June 6, and June 7, 2006.

c. The Order Denying the City of Woodinville's Motion For Attorney Fees and Costs entered July 18, 2006.[1]

2. Issues Pertaining to Assignments of Error

a. Whether or not the City's zoning code provisions and Moratorium Ordinance were subject to the "strict scrutiny" standard of review with the court having concluded as a matter of law that the code provisions and moratorium were facially neutral and did not unreasonably nor substantially burden the exercise of religion by the NUCC. [Conclusions of Law 3.2 - 3.4 at CP 480]

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[1] A supplemental request for the designation of Clerks Papers has been filed with the Superior Court. Clerks Paper's page numbers have not yet been assigned.

b. Whether or not the Court was in err to grant the Temporary Restraining Order allowing Tent City IV to temporarily locate on NUCC property and continuing the TRO throughout the hearing on the preliminary injunction.

c. Whether or not the Court erred when it denied the City's post-hearing motion for attorney's fees on the basis that obtaining the Final Order was necessary to extinguish the TRO that continued through out the combined hearing on the preliminary injunction motion and request for final injunctive relief.

3. Standard of Review for Errors of Law in Cross Appeal.

All of the errors claimed by the City concern decisions based on issues of law and should be reviewed de novo. *See, e.g., Clayton v. Grange Ins. Ass'n.*, 74 Wn. App. 875, 877, 875 P.2d 1246 (1994); *State v. Pierce County*, 65 Wn. App. 614, 617-18, 829 P.2d 217 (1992).

B. STATEMENT OF THE CASE

1. Unchallenged Trial Court Findings of Fact.

In their respective opening briefs, neither SHARE/WHEEL nor Northshore United Church of Christ (NUCC) assign error to any factual finding made by the trial court in the superior court's June 12, 2006 Final Order. [CP 477-483] The following findings contained in the Final Order are thus verities for purposes of this appeal:

2.1 On August 25, 2004 the parties to this lawsuit entered into a Temporary Property Use Agreement which in pertinent part provided in subsection 2. B. that:

> *SHARE/WHEEL and one or more Woodinville-based church sponsor(s) may jointly submit an application to locate a future Tent City at some other church-owned location, but*
>
> *(1) must allow sufficient time in the application process for public notice, public comment and due process of the permit application; and*
>
> *(2) must agree not to establish, sponsor or support any homeless encampment within the City of Woodinville without a valid temporary use permit issued by the city.*

2.2 On or about April 25, 2006, the Defendants submitted an application to the City to allow Tent City 4 on City park property. Use of City park property required approval of the Woodinville City Council; and

2.3 The Defendants completed a temporary use permit application to allow Tent City 4 on NUCC property in the City of Woodinville. The Rev. Forman brought it with him to City Hall, but did not submit it to the City because he was told by City staff[2] that the Land Use Moratorium, established by City Ordinance 419, did not permit the City staff to accept the application; and

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[2] Rev. Forman was told the day before by City Planning Director Ray Sturtz that the Moratorium Ordinance prohibited him from accepting a TUP application allowing the Tent City encampment on NUCC property in the R-1 zone. VRPT for June 1, 2006 at 10 - 11.

2.4 On April 25, 2006 there was not sufficient time for the City to process an application for a temporary use permit that would allow Tent City 4 to locate on NUCC property by May 13, 2006. Temporary Use Permit processing requires a minimum of 30 to 40 days; and

2.5 On May 8, 2006 the Woodinville City Council by majority vote refused to authorize the use of City park property for Tent City 4 beginning May 13, 2006 as requested by the Defendants; and

2.6 On May 12, 2006 the King County Superior Court issued a Temporary Restraining Order allowing Tent City 4 on NUCC property pending the hearing on the Plaintiff's request for a preliminary injunction;[3] *and*

2.7 On May 13, 2006, without a temporary use permit from the City of Woodinville, Defendant SHARE/WHEEL, with the assistance of the NUCC, located and began operating the homeless encampment Tent City 4, on the real property of the NUCC in the City of Woodinville;

2.8 The NUCC property at issue is located in a neighborhood situated within the City of Woodinville's R-1 zoning district; and within the scope of the moratorium validly established by City Ordinance No. 419 on March 20, 2006; and

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[3] The TRO allowing Tent City 4 on NUCC property pending the hearing on preliminary injunction was issue *sua sponte* by the Superior Court. See Opening Brief of NUCC at 10-11 and Opening Brief of SHARE/WHEEL at page 8. Judge Robinson was quoted in the Seattle Times as stating that there was no time to fully judge the arguments before the camp had to move the day of the TRO hearing. "These are important issues and really deserve more attention than any of us have been able to give," she said. See Exhibit J to City's Motion to Quash and for Preliminary Injunctive Relief at CP 77-148.

2.9 The moratorium prohibits the City from accepting or processing new land use applications for permanent or temporary uses in the R-1 zoning district; and

2.10 The locating or establishment of the homeless encampment on the NUCC property without a temporary use permit from the City, violates the laws of the City of Woodinville and the laws of the state requiring compliance with local zoning regulations and prohibiting public nuisance; and

2.11 The issue as to the extent to which the Defendants can use the buildings on church property to physically shelter or house homeless persons within those buildings as a lawful accessory use under the City's zoning regulations was not before this Court; and

2.12 The terms of the 2004 Temporary Property Use Agreement between the parties, including but not limited to Section 2.B., are unambiguous. Evidence as to the intent or the meaning of the contract language at issue is not needed; and

2.13 The Defendants agreed in the 2004 Agreement not to locate a future homeless encampment within the City of Woodinville without a valid permit from the City, and further agreed to timely present any future application for a permit allowing sufficient time to comply with the required public notice, public hearing and due process procedures as set forth in the Woodinville regulations.

2. Pertinent Facts Relating to the City's Cross Appeal.

Over the City's objection, the superior court granted several motions of NUCC, joined by SHARE/WHEEL, to continue the May 12, 2006 TRO [CP 72 - 76] during the pendency of the hearing on the City's motion for a preliminary injunction and to quash the TRO. [CP 407-409, 401-403, 470-472; and VRPT for May 30 at 50:10 - 51:4; VRPT for May 31 at 1:10 - 13; VRPT for June 1 at 45:9 - 25; VRPT for June 2 at 2:14 - 3:2; VRPT for June 6 at 69:17 - 25 and 18:1 - 6 and 71:14 - 18; VRPT for June 7 at 87:13 - 25].

On July 17, 2006, the City filed its motion for attorney fees. The factual basis for the motion was that the fees and costs sought to be recovered were necessarily incurred to dissolve the TRO that continued through June 9, 2006 and the Court's oral decision to grant the City's Motion for preliminary and final injunctive relief.[4] On July 18, 2006 the trial judge denied the motion.

C. ARGUMENT

[4] The motion and supporting declarations of Greg A. Rubstello and Michael P. Scruggs as well as the Order denying the motion are included in the Supplemental Designation of Clerks Papers filed with the Superior Court and do not as of yet have assigned clerks papers page numbers.

1. The superior court did not abuse its discretion by granting the City's CR 65(a)(2) motion for consolidation of the hearing on the motion for a preliminary injunction with the trial on the merits of the injunctive relief requested.

Appellants collectively argue that the trial court's decision at the commencement of the hearing to grant the City's motion for consolidation under CR 65(a) should be reversed because (1) the Court's decision and the City's breach of contract claim both came as a complete surprise, and (2) consolidation allegedly denied Appellants of their constitutionally protected right to a jury trial. [NUCC Brief at 17-18; SHARE/WHEEL Brief at 13-15] Both of these arguments are groundless. The former is not supported by the record. The latter is not supported by Washington law.

a. Abuse of discretion is the appropriate standard of review.

The superior court appropriately exercised its discretion in ordering consolidation. CR 65(a)(2) provides:

> (2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, *the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.* Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subsection shall be so construed and applied

> as to save to the parties any rights they may have to trial by jury. ... (emphasis added)

A review of the relevant facts demonstrates that the court's decision was neither "manifestly unreasonable or exercised on unreasonable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

b. SHARE/WHEEL AND NUCC were both aware prior to the hearing date on the City's motion for a preliminary injunction that (1) a breach of contract claim was a basis for the motion and that (2) the City was requesting consolidation of the hearing with a trial on the merits.

The City's position that the 2004 Agreement prohibited the encampment on NUCC property was raised by the City in its initial motion for a TRO heard on May 12, 2006. SHARE/WHEEL's opening brief identifies the pertinent factual history:

> The filing of the TRO was the first time the Respondent raised the issue of the applicability of the 2004 Agreement. [VRPT, June 9, 2006, pp. 73-75.]

[SHARE/WHEEL Brief at 8]

On May 22, 2006 the City filed it motion for preliminary and final injunctive relief. [CP 77-148] Again, as SHARE/WHEEL acknowledges:

> The Respondent requested that the trial court (1) quash the temporary restraining order entered on May 12, 2006; ***(2) consolidate a trial on the merits with the hearing for preliminary injunction pursuant to CR 65(a)(2)***; (3) order preliminary injunctive

> relief; and (4) order permanent injunctive relief. [Id.] (emphasis added)

[SHARE/WHEEL Brief at 9]

SHARE/WHEEL answered the City's motion with a responsive pleading arguing against the consolidation and that there was no breach of contract. The briefing was filed with the superior court on May 25, 2006. [CP 350-362]

> Appellant SHARE/WHEEL argued that (1) *there were compelling reasons why a trial on the merits should not be consolidated with the hearing for preliminary and final injunctive relief*; ... and (4) *SHARE/ WHEEL did not breach the 2004 Agreement did not apply to the proposed occupancy of NUCC property in 2006.* [CP 350-362.] (emphasis added)

[SHARE/WHEEL Brief at 9-10]

In light of this factual history, it is disingenuous for Appellants to assert surprise that the City's amended complaint — filed and served on SHARE/WHEEL and the attorneys for NUCC the afternoon of May 26, 2006 — contained:

> ... a cause of action for breach of contract, alleging that the Appellants breached the 2004 Temporary Property Use Agreement by (1) untimely filing an application for a Temporary Use Permit ("TOP"); and (2) by siting TC4 on NUCC's property without a valid TUP. The Respondent requested that the trial court specifically enforce the provisions of the 2004 Agreement and award damages. ...

[SHARE/WHEEL Brief at 11]

The breach of contract allegations contained in the Amended Complaint [CP 363-367] were facially consistent with the arguments the City had made in its motion for preliminary and final injunctive relief [CP 78-79, 84], where the City argued that: " ... *[t]he issuance of immediate injunctive relief represent the only effective remedy available to the City to remedy the breach of contract and to rebate the zoning and environmental regulations that are being violated by the presence of Tent City 4 on the NUCC property.*"

The breach of contract claim set forth in the City's briefing before the superior court and in its Amended Complaint clearly supported both specific performance (i.e., injunctive relief) and a monetary damages claim. [CP 363-367]

The trial judge's decision to grant the City's motion to consolidate the preliminary injunction hearing with the trial on the merits should have come as no surprise to SHARE/WHEEL or to NUCC. Both parties certainly knew from the filing of the City's motion for preliminary and final injunctive relief that the trial judge might grant the City's motion for consolidation under CR 65(a)(2). Live testimony was allowed and offered by all parties.

Based on the above facts, it is equally disingenuous for Appellants to claim any surprise that their alleged breach of the 2004 Temporary

Property Use Agreement was a factual issue before the court that needed to be addressed through testimony and documentary evidence.

c. Neither SHARE/WHEEL or NUCC were denied their constitutionally protected right to a jury trial by the consolidation of the hearing on the preliminary injunction motion with the trial on the merits of the injunctive relief requested.

Appellants' argument that the superior court violated their constitutional rights to a jury trial is without merit. The superior court's June 12, 2006 Final Order expressly provided that the City's contractual claim for damages "is reserved for later determination in the regular course." [CP 481-82] "When a matter contains both legal and equitable issues, a trial court has broad discretion as to whether it will allow a jury on none, some or all of the issues." *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 348, 760 P.2d 368 (1988); and *State Ex Rel. Evergreen Freedom Foundation v. WA. Education Asso.*, 111 Wn. App. 586, 611, 49 P.3d 894 (2002). Here, the overwhelming thrust of the City's requested relief — including both its code enforcement claim and its breach of contract claim for which specific performance was requested as relief — sought the immediate removal of the Tent City 4 encampment from NUCC property, and was thus clearly equitable rather than legal in nature.

SHARE/WHEEL relies upon *Scavenius v. Manchester Port Dist.*, 2 Wn. App. 126, 467 P.2d 372 (1970), in support of its argument that the trial court abused its discretion. [SHARE/WHEEL Brief at 14] The more recent case of *Kim v. Dean*, 133 Wn. App. 338, 135 P.3d 978 (2006), from Division I clarifies that where mixed issues are present, but the predominant issues are equitable, denial of a jury trial is proper.

> In Scavenius v. Manchester Port Dist., 2 Wash. App. 126, 467 P.2d 372 (1970), the Court of Appeals Division Two, construed [CR 38 and 39] as giving the trial court a wide discretion in cases involving both legal and equitable issues to submit to a jury some, none, or all of the legal issues presented. It set forth a number of criteria for the exercise of that discretion. We approved those criteria in Brown v. Safeway Stores, Inc., 94 Wash.2d 359, 617 P.2d 704 (1980). In that case, we said that where an action is purely equitable in nature, there is no right to a trial by a jury, citing Dexter Horton Bldg. Co. v. King County, 10 Wash.2d 186, 116 P.2d 507 (1941). **We held that, where the pleadings present a mixture of legal and equitable issues but the primary relief sought is equitable in nature, denial of a jury trial is proper.** Anderson, 94 Wash.2d at 729-30, 620 P.2d 76 (footnote omitted). "[I]n an equity case the court may empanel a jury only for advisory purposes, unless both parties consent to be bound by the verdict[.]" Anderson, 94 Wash.2d at 731, 620 P.2d 76 (citing CR 39(c)).

Kim, 133 Wn. App. at 342 (emphasis added). The superior court's June 12, 2006 Final Order clearly complied with CR 65(a)(2) under this

standard, and Appellants' assertions to the contrary should be rejected by this court. [5]

d. Consolidation did not deprive either appellant of an opportunity to respond to the claimed breach of contract as a basis for the requested injunctive relief.

In their responsive briefing to the City's motion for preliminary injunctive and other relief, both SHARE/WHEEL and NUCC had an opportunity to fully brief the breach of contract issue prominently raised in the City's motion. [CP 77-148] With knowledge of the City's motion to consolidate under CR 65(a)(2), both Appellants clearly could have prepared witnesses and/or declarations to address the breach of contract issue.

The trial court expressly reserved from its Final Order any decision on what amount, if any, of damages were owed the City on its breach of contract claim and the right to trial by jury on that issue. SHARE/WHEEL and NUCC have an opportunity for discovery under the Civil Rules in preparation for the requested jury trial.

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[5] Even assuming *arguendo* that the superior court did in fact err by consolidating the merits of the City's contract claim with the preliminary injunction hearing, this alleged error would not invalidate the core injunctive relief sought by the City and granted by the court. The superior court's June 12, 2006 Final Order included two wholly separate and independent grounds for the injunction — i.e., the breach of contract claim *and* the zoning violation claim. [Final Order, Conclusions of Law #3.1-3.10] It is axiomatic that an appellate court may affirm the trial court's ruling on *any* basis supported by the record. *See, e.g., State v. Ginn*, 128 Wn. App. 872 , 884 n.9, 117 P.3d 1155 (2005). Appellants' consolidation argument regarding the merits of the contractual claim is accordingly without effect.

Neither SHARE/WHEEL or NUCC made any request prior to the hearing commencing May 30, 2006 or during the two week period of the hearing, to depose any City employee, official or other person with regard to the breach of contract claim. The CRs allow for depositions to be taken on shortened time schedules in preparation for hearings on preliminary injunctions. *See* CR 30. Since the hearing took place over a two week period and court time was limited to an hour or two each morning, there was time for depositions to be taken had any request to the court been made by a party.

Likewise, NUCC's contention that the trial court entered judgment before the Appellants had an opportunity to answer the amended complaint, and were therefore denied due process, wholly disregards the factual background of the case. [NUCC Brief at 21] The extended hearing schedule left opportunity each day of the hearing for the parties to prepare and file additional pleadings. NUCC in particular presented written motions nearly *every day* of the hearing seeking to continue the TRO, quash various declarations, and to strike exhibits submitted by the City. In its discretion. NUCC simply chose to wait to answer the Amended Complaint until after the court entered its Final Order. NUCC cannot blame the trial court for its own chosen case strategy in this regard.

2. The Trial Court did not err in concluding that both SHARE/WHEEL and NUCC breached the 2004 Temporary Property Use Agreement (Conclusion of Law 3.5).

a. Unchallenged findings of fact have become verities on appeal and support Conclusion of Law 3.5.

The unchallenged findings of fact set forth in the superior court's June 12, 2006 Final Order have become *verities* for purposes of this appeal. *See, e.g. West Coast, Inc., v. Snohomish County*, 112 Wn. App. 200, 207, 48 P.3d 997 (2002). The unchallenged findings are dispositive of the breach of contract issue. Based on these findings, the trial court's Conclusion of Law¶ 3.5 is unquestionably appropriate:

> 3.5 As a matter of law, the Defendants and each of them, are in violation of, and have breached, the 2004 Temporary Property Use Agreement;

[CP 481]

b. Appellant's arguments that the 2004 agreement did not apply to the events of 2006 based on "contract interpretation" ignores that the contract is unambiguous and does not require the court's interpretation.

SHARE/WHEEL contends that the "context rule" for interpreting written contract language requires a conclusion that the term of the 2004 Temporary Property Use Agreement was limited to the period during which the Tent City 4 encampment remained on City park property in 2004. [SHARE/WHEEL Brief at 16-21] This argument is not well taken.

Extrinsic evidence is admissible under the context rule, even if a contract term appears unambiguous. *Denny's Restaurants, Inc. v. Security Union Title Ins. Co.*, 71 Wn. App. 194, 200-01, 859 P.2d 619 (1993). Extrinsic evidence is not admissible, however, to contradict or supplement an integrated, unambiguous instrument, even under the context rule. *Id.* at 201.

The trial court found the 2004 Temporary Property Use Agreement (Exhibit 1) to be an integrated agreement. [*See* unchallenged findings of fact 2.1 and 2.12 and 2.13, *supra*] The superior court's finding that the agreement is integrated is also consistent with Section 28 of the agreement which reads:

> Section 28. Final and Complete Agreement. This Agreement together with the Exhibits attached hereto constitutes the final and complete expression of the parties on all subjects. This Agreement may not be modified, interpreted, amended, waived or revoked orally, but only in writing signed by all parties. This Agreement supersedes and replaces all prior agreements, discussions and representations on all subjects including without limitation. No party is entering into this Agreement in reliance on any oral or written promises, inducements, representations, understandings, interpretations or agreements other than those contained in this Agreement and the exhibits hereto.

Exhibit 1 at 92.

SHARE/WHEEL and NUCC both attempt to add a term to the 2004 agreement that would contradict the unambiguous language of

Section 2.B., which in turn specifically addresses the location of a *future* Tent City at a *church-owned* location. City Manager Rose noted in his December 2004 "Compliance Analysis," Exhibit 1 at page 105, that "[t]his is a *future* consideration." (Emphasis added.) A contract term that would limit the term of the entire agreement to the period the encampment was allowed to stay on City park property in 2004 facially contradicts Section 2.B. and Section 3.B., which include an additional restriction prohibiting SHARE/WHEEL from operating, sponsoring or otherwise supporting a homeless encampment in the City before November 1, 2005. Tent City 4 left Woodinville for relocation at St. John Mary Vianney Catholic Church in Kirkland on November 20, 2004. [Exhibit 1 at page 8]

Appellants essentially invite this court to add a new contradictory provision that effectively strikes out of the agreement their promises (i.e., consideration) to the City regarding restrictions on future encampments. City Manager Rose specifically testified that a purpose of the Temporary Use Agreement was to ensure that the circumstance occurring in 2004 did not happen again in the future. The City offered its park site as a solution in 2004 in exchange for promises that city zoning and land use regulations would be respected in the future. City Manager Rose testified at VRPT for May 30 at 33:14-24 that:

> ... Our emergency ordinance was going to make it possible in this case, but we didn't want to allow that and again in the future, and I was authorized to negotiate an agreement.

> And part of that agreement was that they wouldn't come back without a permit process.
>
> Q. And with Ordinance 369 authorizing your negotiation of an agreement, did you in fact -- did the City in fact negotiate agreement with SHARE and Northshore U.C.C.?
>
> A. Yes.

c. The breach of the 2004 Temporary Property Use Agreement is an independent basis for the requested injunctive relief.

NUCC argues that because the City's Planning Director stated he could not accept the TUP application for the encampment on NUCC property in the R-1 zone due to the moratorium ordinance, the City cannot assert the 2004 Agreement as a basis for the requested injunctive relief. [NUCC Brief at 39-40] There is no citation to any authority for this argument. Moreover, even absent the moratorium, an application for a TUP for the church property was untimely and in violation of section 2.B of the 2004 Agreement. The application allowing the encampment on May 13, 2006, had it been removed from Pastor Forman's pocket and handed to the Woodinville planning Director would have been properly rejected.

The City's action for injunctive relief under the 2004 Agreement is independent of its decision to not accept an application for a TUP in the R-1 zoning district covered by the moratorium. The contractual commitments set forth in Section 2.B. of the 2004 Agreement and quoted

in Finding of Fact No. 2 of the superior court's Final Order are enforceable on their own merits.

d. The City did not breach the 2004 Temporary Property Use Agreement, and even if it had, SHARE/WHEEL and the NUCC were not authorized to violate the agreement and city zoning regulations as a result.

SHARE/WHEEL suggests on appeal that its own contractual breach was excused because *the City* allegedly violated the 2004 agreement. [SHARE/WHEEL Brief at 21-23] Under SHARE/WHEEL's novel theory, the City's refusal to accept and process NUCC's permit application on April 25, 2006 breached the 2004 agreement and effectively authorized Appellants' installation of the Tent City 4 encampment without a permit and in breach of the 2004 Agreement which required a permit. [SHARE/WHEEL Brief at 21-23]

This argument fails on several grounds. First, the 2004 agreement by its terms requires *Appellants* to comply with applicable permitting procedures. Nowhere does the contract impose any obligation upon the City to accept and/or process an untimely submitted future permit application temporarily prohibited by a temporary moratorium ordinance. [Plaintiff's Exhibit No. 1] Second, Section 33 of the agreement includes an express reservation of the City's regulatory authority:

> Section 33. Regulatory Authority Reserved. The Parties hereto acknowledge that the City as executed this Agreement in its proprietary capacity as legal owner of the Property.

> Nothing herein shall be construed as a waiver, abridgement or other limitation of the City's regulatory authority, which the City herby expressly reserves in full.

[Plaintiff's Exhibit #1 at 93-94]

This express reservation of authority necessarily and obviously encompasses the City's ability to adopt new land use regulations, including, *inter alia*, the March 20, 2006 moratorium ordinance.[6] There is an implied covenant of good faith and fair dealing in every contract, a covenant or implied obligation by each party to cooperate with the other so that he/she may obtain the full benefit of performance. *Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Union Local* 584, 222 F. Supp. 125, 130 (1963); *see also* 17 Am. Jur. 2d Contracts §371 p. 814; 17A C.J.S. Contracts §328 pp. 282-86. However, it cannot be seriously argued that the City's adoption of the R-1 moratorium — which occurred without any indication that Tent City IV was contemplating a return to Woodinville — violated this covenant of good faith and fair dealing.

e. <u>The 2004 Agreement's restrictions on future encampments are clear and unambiguous.</u>

Appellants further contend that the 2004 Temporary Property Use Agreement is "vague" and must be construed against the City as the

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[6] Indeed, the City as a matter of law could not have promised SHARE/WHEEL and NUCC that additional zoning ordinances altering or constraining the applicable permit process, including moratoria, would not be adopted in the future. A municipality simply "cannot contract away its police power" in this manner. *Miller v. City of Port Angeles*, 38 Wn. App. 904, 913, 691 P..2d 229 (1984).

instrument's alleged drafter. [NUCC Brief at 42] This assertion is without merit. The superior court's unchallenged factual finding is that the terms of the 2004 agreement "are unambiguous," obviating the need for extrinsic evidence of the parties' intent. [Final Order, Finding of Fact #2.12] *See, e.g., Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 509, 115 P.3d 262 (2005) (extrinsic evidence available only to determine meaning of specific words in contract, not as evidence of parties' general intent). Moreover, Section 24 of the agreement clearly provides that *all* signatories enjoyed an equal opportunity in the drafting process, and that "[n]o ambiguity shall be construed against any party based upon a claim that that party drafted the ambiguous language." [Trial Exhibit #1]

3. The violation of a zoning regulation is a nuisance *per se* as a matter of law.

The superior court's determination that the unlawful installation of Tent City 4 homeless encampment was a nuisance *per se* was amply supported and should be affirmed by this court. [CP 481] SHARE/WHEEL, however, attempts to distinguish *City of Mercer Island v. Steinmann*, 9 Wn. App. 479, 513 P.2d 80 (1973) which held that the violation of a City of Mercer Island zoning regulation was a nuisance *per se*. SHARE/WHEEL mistakenly argues that, "[u]nlike *Steinmann*, the Woodinville Municipal Code does not create a nuisance per se when there is a code violation." [SHARE/WHEEL Brief at 23] In reality, the Woodinville Municipal Code contains the following provisions:

1.03.030 Nuisance.

In addition to the penalties set forth above [criminal and civil penalties], all remedies given by law for the prevention and abatement of nuisances shall apply regardless of any other remedy.

1.06.160 Additional relief.

(1) The provisions of this chapter are in addition to and not in lieu of any other penalty, sanction or right of action provided by law.

(2) The City may at any time seek legal or equitable relief to enjoin any acts or practices and seek to abate any condition which constitutes or will constitute a violation of the applicable provisions of the Woodinville Municipal Code and/or the City's Shoreline Master Program.

1.07.030 Violations.

(1) It is unlawful to violate any applicable provision of the Woodinville Municipal Code.

(2) It is unlawful for any person to initiate, maintain or cause to be initiated or maintained the use of any ... land or property within the City without firs obtaining any and all permits or authorizations required for its use by the applicable provisions of the Woodinville Municipal Code ... .

(3) It is unlawful for any person to use, ... or cause to be used, , any ... land or property within the City in any manner that is not permitted by the terms of any permit or authorization issued pursuant to the applicable provisions of the Woodinville Municipal Code ... .

Engaging in any otherwise lawful activity, even a constitutionally protected activity, in defiance of a law regulating or prohibiting the same, is a nuisance *per se*. *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 138, 720 P.2d 818 (1986). "[A] city or county ordinance regulating land use and providing for injunctions against violations of its provisions, ...indicates a decision by the legislative body that the regulated behavior warrants enjoining, *and that the violation itself is an injury to the community*. It is not the court's role to interfere with this legislative decision." *Kev,* supra, at 139 (citing *County of King ex rel. Sowers v. Chisman*, 33 Wn. App. 809, 819, 658 P.2d 1256 (1983)) (emphasis added by court). The *Steinmann* court further noted that:

> The enforcement of a zoning ordinance by injunction is essential if the amenities of the area sought to be protected are to be preserved. 1 E. Yokley, Zoning Law and Practice §10-6 (3d ed. 1965); 3 E. Yokley, Zoning Law and Practice §22-4 (3d ed. 1967).

In *W.W. Shields v. Spokane School District No. 81*, 31 Wn.2d 247, 254, 196 P.2d 352 (1948) our state supreme court adopted the following language from the case of *Robinson Brick Co. v. Luthi*, 115 Colo. 106, 169 P.2d 171, 166 A.L.R. 655.

> 'Where the legislative arm of the government has declared by statute and zoning resolution what activities may or may not be conducted in a prescribed zone, *it has in effect declared what is or is not a public nuisance.* What might have been a proper field for judicial action prior to such legislation becomes improper when the law-

> making branch of government has entered the field.'

9 Wn. App. at 486 (emphasis added).

The trial court's Conclusion of Law 3.6 in which "The Court finds the violation of the City's zoning applicable to the R-1 zone and moratorium ordinance to be a nuisance per se" is solidly supported by the record evidence and by Washington law.

4. A tent encampment is not an allowed accessory use under the Woodinville Municipal Code.

NUCC argues that homeless encampments are an allowed "accessory use" under the Woodinville Municipal Code (WMC). [NUCC Brief at 44-47] This contention, however, fails under even a cursory review of the applicable City zoning regulations. The codified definition of "church" upon which NUCC relies expressly limits "accessory uses" to those occurring "in the primary or accessory *buildings*" on a particular church's property. *See* WMC 21.06.100:

> [A] place where religious services are conducted and including accessory uses **in the primary or accessory buildings** such as religious education, reading rooms, assembly rooms, and residences for nuns and clergy, but excluding facilities for training of religious orders, including uses located in NAICS Industry No. 81311. (emphasis added)

Because the Tent City 4 encampment is located *outdoors* on the NUCC site and not within any building, NUCC's accessory use theory is

wholly without merit. Tents are not buildings. WMC 21.06.068 defines a "building" as:

> Building: any **structure** having a roof. (emphasis added)

The term "structure" is defined in WMC section 21.06.640 to mean:

> Structure: anything permanently constructed in or on the ground, over the water; including rockeries and retaining walls over four feet and signs, but excluding fences less than six feet in height and decks less than 18 inches above grade; or paved areas, and excluding structural or nonstructural fill.

The church's reliance upon the WMC guidelines for residential accessory uses is similarly misplaced. WMC 21.06.013 defines such accessory uses in relevant part as "[a] use, structure, or activity which is subordinate and incidental to a *residence*[,]" a definition which facially excludes nonresidential structures like the church building at issue herein. (Emphasis added).

NUCC's citation to zoning cases from other jurisdictions is equally unpersuasive, as zoning is an inherently local process and the instant case involves only the City of *Woodinville's* land use regulations. [NUCC Brief at 45-46] And even assuming *arguendo* that the WMC provisions governing residential accessory uses were in fact capable of differing constructions, the determination of the City's Planning Director — the

only official authorized to interpret the WMC's zoning regulations — should control as a matter of law. [VRPT for June 1, 2006 at 10] *See, e.g., Eastlake Community Council v. City of Seattle*, 64 Wn. App. 273, 283, 823 P.2d 1132 (1992) ("A court should give special deference to the construction of an ordinance by those officials charged with its enforcement"); *Citizens for a Safe Neighborhood v. City of Seattle*, 67 Wn. App. 436, 440, 836 P.2d 235 (1992); WMC 21.02.090(4). The Woodinville Planning Director's conclusion that a homeless encampment is *not* an allowed accessory use under the WMC is fatal to NUCC's proffered code interpretation. Planning Director Sturtz testified [VRPT for June 1 at 29:6-14] that tents are temporary shelters permitted in the City's CBD and public institution zones but not in the R-1Zone. Thus, a Temporary Use Permit was required in the R-1 zone for this category of use..

In addition, the arguments made by NUCC that the code interpretation made by Planning Director Sturtz would require bake sales, Easter egg hunts and like to have a temporary use permit is without merit. WMC Section 21.32.110(2) provides that:

> ... any use not exceeding a cumulative total of two days each calendar year shall be exempt from requirements for a temporary use permit.

5. The City's R-1 Zoning District Moratorium Does Not Violate RLUIPA, the First Amendment, or Article I, Section 11 of the Washington Constitution.

NUCC argues that the City's R-1 moratorium violates the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), the First Amendment to the United Stares Constitution, and Article I, Section 11 of the Washington Constitution. [NUCC Brief at 21-39] NUCC's theory in this regard is premised upon the false assumption — properly rejected by the superior court — that the moratorium imposes a "substantial burden" upon NUCC's ability to exercise its religion. Courts construing RLUIPA, the First Amendment and the Washington Constitution have consistently dismissed this contention.

Contrary to NUCC's assertions, the mere fact that local land use regulations may prevent the utilization of a *particular* site for a religious organization's most desired purpose does not, as a matter of law, constitute a "substantial burden" on religious exercise. At most, the City's adoption and enforcement of its facially neutral moratorium *temporarily* prevented NUCC from hosting the Tent City 4 encampment at *one* location within the City's territorial jurisdiction. This limited constraint hardly rises to the level of a "substantial burden" as that standard has been defined by applicable case precedent. This court should accordingly reject

NUCC's argument and affirm the superior court's ruling. The moratorium is constitutional and does not violate RLUIPA.

a. The City's land use moratorium is facially valid.

The Woodinville City Council imposed the City's current moratorium on the acceptance and processing of new land use permits by unanimously adopting Ordinance No. 419 on March 20, 2006. [Plaintiff's Exhibit No. 7; VRP June 1, 2006 at 3:15] The moratorium's stated purpose is to preserve the *status quo* of the City's ecologically sensitive R-1 zoning district pending completion of a sustainable development study. [Plaintiff's Exhibit No. 7] Significantly, imposition of the moratorium occurred several weeks before NUCC contacted the City with its request to host the Tent City 4 homeless encampment, and Ordinance No. 419 itself neither references nor facially discriminates against religious practices. [Plaintiff's Exhibit No. 7; VRP May 31, 2006 at 16:15-25]

Ample legal authority supports the superior court's conclusion that the R-1 moratorium reflects "an enforceable and valid exercise of the City's police power[.]" [CP 480] "[M]oratoria, or 'interim development controls, as they are often called, are an essential tool of successful development," *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 338 (2002), and are expressly

sanctioned by Washington law. *See, e.g.,* RCW 36.70A.390; RCW 35A.63.220. Far from attracting the heightened judicial scrutiny requested by NUCC, courts, "[r]ecognizing the emergency, temporary, and expedient nature of such regulations, . . . have tended to be *more* deferential than usual to the local legislative body." *Matson v. Clark County Bd. of Cmmn'rs*, 79 Wn. App. 641, 644, 904 P.2d 317 (1995) (citing Richard L. Settle, *Washington Land Use and Environmental Law and Practice*, §2.13, at 73 (ed. 1983) (emphasis added). The policy justifications underlying the City's R-1 moratorium are plainly recited in Ordinance No. 419 itself, and the record contains no suggestion of any procedural noncompliance in adopting this enactment. [VRP June 1, 2006 at 6:18-25, 77:1-2; Plaintiff's Exhibit No. 7]

NUCC nevertheless contends that the moratorium's intended effect is undercut by the limited exceptions in Ordinance No. 419 for "the remodeling, expansion, restoration or refurbishment" of existing residential structures and for permits involving publicly owned facilities. [NUCC Brief at 23-24] This argument is unpersuasive. The issuance of building permits for the repairing, remodeling, etc. of extant structures obviously creates little or no *additional* impact on the surrounding environment, as the underlying land uses in question *already* exist. And the exception for public work simply clarifies that the moratorium does

not prevent governmental entities from repairing or constructing roads, utilities and other necessary public facilities. [VRP June 1, 2006 at 25:4-21] Both exemptions reflect commonsensical policy determinations by the Woodinville City Council, and, as the Council specifically found, create a *de minimus* impact with respect to the moratorium's purpose. [Plaintiff's Exhibit No. 7] NUCC's attempt to invalidate the moratorium on this basis is without merit.[7] Moreover, neutral regulations of general applicability that do not require a system of individualized exceptions, that is a system in which a case by case subjective analysis is required are constitutional even though exceptions exist. Grace United Methodist v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006).

b. The City did not act arbitrarily and capriciously by informing NUCC that it would not accept the church's permit application.

Woodinville Planning Director Ray Sturtz informed NUCC representative Paul Foreman that the moratorium would prevent the City from accepting a temporary use permit application to host the Tent City 4 homeless encampment on the NUCC church site. [VRPT for June 1, 2006 at 10:14-25, 11:1-4, 13:5-12] NUCC attempts to characterize the City's

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[7] Even assuming *arguendo* that Ordinance No. 419's exemptions for existing structures and public facilities are in fact constitutionally suspect, the alleged infirmity of these specific provisions would not invalidate the moratorium. Pursuant to the severability clause of the ordinance, the appropriate judicial remedy would instead be to excise these provisions from the body of Ordinance No. 419, leaving the moratorium itself intact. [Plaintiff's Exhibit No. 7] *See, e.g. Kennedy v. McGuire,* 38 Wn. App. 237, 242, 684 P.2d 1359 (1989).

action in this regard as "arbitrary and capricious." [NUCC Brief at 35-39] Under the church's theory, the City's R-1 moratorium is inapplicable to NUCC's permit application, because (1) the term "land use permit" — as used in Ordinance No. 419 — is not specifically defined by the Woodinville Zoning Code, and (2) the moratorium was allegedly intended to encompass only development that would "irreversibly alter" the underlying property. [NUCC at 36, 39] NUCC instead contends that the City was legally required "to accept and analyze the application, weighing the City's interests against the Church's religious expression." [NUCC Brief at 36]

The church's argument disregards both the plain language of Ordinance No. 419 and the "arbitrary and capricious" legal standard upon which NUCC relies. In the context of local land use regulations, an arbitrary and capricious decision is one made "without consideration and in disregard of the facts." *State ex rel. Myhre v. City of Spokane*, 70 Wn.2d 207, 210, 422 P.2d 790 (1967); *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990). The party challenging a local land use decision on this basis bears the burden of proof. *Myhre*, 70 Wn. App. at 210. As applied to the church's April 2006 TUP application, NUCC cannot satisfy this burden.

By its terms, the moratorium imposed under Ordinance No. 419 applies broadly to *all* land use permit applications with respect to the City's R-1 zoning district:

> The City hereby imposes a moratorium upon the receipt and processing of building permit applications, *land use applications*, and any other permit application for the development, rezoning or improvement of real property within the R-1 Zoning District[.]

[Plaintiff's Exhibit No. 7 (emphasis added)] The only exceptions to this near-categorical mandate are the limited provisions for existing structures and public facilities. [Plaintiff's Exhibit No. 7] By informing Reverend Foreman that the City could not accept a permit application for the NUCC site the Woodinville Planning Director was simply following the clear directive of Ordinance No. 419. [VRP June 1, 2006 at 10:5-25, 11:1-4] This statement was neither arbitrary nor capricious.

NUCC's "arbitrary and capricious" argument rests upon the untenable premise that its April 2006 TUP application was not a "land use application" within the meaning of Ordinance No. 419. The church's proffered interpretation of the ordinance in this regard fails as a matter of law. Temporary use permits are regulated by standards codified in the zoning title of the Woodinville Municipal Code, are issued by either the

City's Planning Director or land use Hearing Examiner, and by definition involve the temporary "use" of "land." *See, e.g.,* WMC 21.32.100 -.120 (establishing substantive standards for TUPs); WMC 21.42.040- .110 (establishing decisional procedures for TUPs); WMC 21.06.650 (defining temporary use permit). NUCC's contrary construction of the term "land use permit" is clearly without foundation.

Moreover, even assuming *arguendo* that the relevant text of Ordinance No. 419 was in fact ambiguous, the Planning Director's interpretation of this language should control as a matter of law. As the only official authorized to interpret the WMC's land use regulations and Ordinance No. 419, the Director's construction of the City's moratorium is entitled to significant weight. *See, e.g., Eastlake Community Council v. City of Seattle*, 64 Wn. App. 273, 283, 823 P.2d 1132 (1992) ("A court should give special deference to the construction of an ordinance by those officials charged with its enforcement"); WMC 21.02.090(4) [Plaintiff's Exhibit No. 7; VRP June 1, 2006 at 3:19-22]. This well-established maxim of statutory interpretation, together with the plain language of Ordinance No. 419, conclusively undermines NUCC's "arbitrary and capricious" argument.

c. The City's moratorium does not violate the First Amendment.

NUCC's contention that the R-1 moratorium violates the church's First Amendment rights is likewise erroneous and was correctly rejected by the superior court. Under NUCC's theory, the City was required to justify its enforcement of the moratorium against NUCC's property with evidence of a "compelling" governmental interest. [NUCC Brief at 24-31] But like NUCC's other arguments in this litigation, its First Amendment theory is premised upon an incorrect standard of review.

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"[8] Significantly, however, the First Amendment does *not* prevent enforcement of neutral zoning restrictions of general application notwithstanding their incidental burden upon a particular religious practice. *See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-32 (1993); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d, 1024 1030-32 (9th Cir. 2004); *Open Door Baptist Church v. Clark County*, 120 Wn.2d 143, 164-70, 99

[8] By virtue of its incorporation into the Fourteenth Amendment, the Free Exercise Clause is applicable to the States and their political subdivisions. *See Employment Div., Oregon Dep't of Human Resources v. Smith,* 494 U.S. 872, 876-77 (1990).

P.2d 33 (2000). Neutral and generally applicable regulations of this type are subject to a highly deferential "rational basis" standard of constitutional review. *San Jose Christian College*, 360 F.3d at 1030-32. "It is only if a law is *not* neutral or *not* of general applicability that [courts] examine the 'compelling governmental interest. . . prong[.]'" *Id.* at 1030 (emphasis added). NUCC fails to discuss, apply or even acknowledge this controlling standard, and the church's unpersuasive emphasis upon the "compelling" interest criterion is accordingly without merit.

NUCC is wholly unable to establish that the City's zoning regulations — including the current moratorium upon land use permits within the R-1 zoning district — discriminate in any manner against religious activities or uses. Instead, NUCC's constitutional theory claims a deprivation simply because the church is prohibited from performing a particular religious function upon a specific parcel. This contention has consistently been rejected as a basis for challenges under the First Amendment, *see, e.g., San Jose Christian College*, 360 F.3d at 1030-32, and has been specifically rebuffed in the context of local restrictions on the location and operation of homeless shelters. *See, e.g., First Assembly of God of Naples v. Collier County*, 20 F.3d 419, 422-24 (11th Cir. 1994).

The cases cited by NUCC in support of its First Amendment claim are of minimal precedential value. [NUCC Brief at 24-26, citing *Fifth Avenue Presbyterian Church, City of New York*, 293 F.3d 570 (2d. Cir. 2002), *Stuart Circle Parish v. Bd. of Zoning Appeals for the City of Richmond,* 946 F. Supp. 1225 (E.D. Va. 1996), and *The Jesus Center v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698 (Mich. App. 1996)] The court in *Fifth Avenue Presbyterian Church* applied the "compelling" interest criterion only because the defendant municipality in that case had failed to support its appellate argument with *any* citation to a relevant neutral ordinance of general application. *See Fifth Avenue Presbyterian Church*, 293 F.3d at 575-76. The *Fifth Avenue* decision is facially distinguishable from the instant matter, where, as the superior court correctly found, the City Woodinville's zoning, permitting and moratorium regulations *are* neutral and generally applicable. [CP 480] Likewise, the courts in *Stuart Circle Parish* and *The Jesus Center* analyzed the zoning ordinances at issue not under the First Amendment, but under the Religious Freedom Restoration Act (RFRA) — a federal statute that has since been invalidated. *Stuart Circle Parish*, 946 F. Supp at 1237-40; *The Jesus Center,* 544 N.W.2d at 702-05; *cf. City of Boerne v. Flores*, 521 U.S. 507 (1997). Significantly, the *Jesus Center* court noted

that, as a neutral regulation of general applicability, the zoning ordinance challenged in that case *would* likely satisfy the First Amendment. *The Jesus Center*, 544 N.W.2d at 702 n.6. The persuasive weight of these decisions for purposes of the present matter is thus suspect at best.[9]

By its plain terms, Ordinance No. 419 applies evenhandedly to all "land use permits" within the City's R-1 zoning district. [Plaintiff's Exhibit No 7] The ordinance neither references nor facially discriminates against any religious practice, and no record evidence remotely suggests that it was enacted as a result of any City animus toward religion. To the contrary, throughout the adoption process for Ordinance No. 419, the City was wholly unaware that NUCC and SHARE/WHEEL would attempt to establish another homeless encampment in Woodinville. [VRP June 1, 2006 at 5:1-5, 21-25, 6:1-2, 7:9-23] As such, the City's moratorium represents a neutral and generally applicable land use regulation, and is subject to judicial review under the deferential "rational basis" test. *San Jose Christian College,* 360 F.3d at 1030-32. The voluminous legislative findings contained in Ordinance No. 419 easily satisfy this standard.

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[9] The other case cited by NUCC, *St. John's Evangelical Lutheran Church v. City of Hoboken*, 479 A.2d 935 (N.J. Super. 1983), represents an obviously outdated anomaly with respect to prevailing First Amendment jurisprudence. [NUCC Brief at 28-30] The *St. John's* opinion neither recites nor applies the modern statement of the Free Exercise standard, under which an incidental burden on a particular religious practice permissible

[Plaintiff's Exhibit No. 7] The "compelling interest" requirement is inapplicable under these circumstances, and NUCC's First Amendment argument fails accordingly.

d. The City's moratorium does not violate RLUIPA.

NUCC next alleges that the City's R-1 moratorium violates the Religious Land Use and Institutionalized Persons Act (RLUIPA). [NUCC Brief at 33-35] Characterizing the moratorium as "an impermissible suppression of the Church's religious freedom," NUCC construes RLUIPA as requiring the City to demonstrate that the moratorium is the least restrictive means of furthering a compelling government interest. [NUCC Brief at 35] Like its First Amendment argument, however, NUCC's RLUIPA theory mischaracterizes the applicable legal standard.

RLUIPA prohibits local governments from unduly restricting religious exercise though the imposition of land use regulations:

> No government shall impose or implement a land use regulation in a manner that imposes a *substantial burden* on. . . religious exercise. . . unless the government demonstrates that imposition of the burden. . . (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

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if the regulation at issue is neutral and generally applicable. *See, e.g., San Jose Christian College*, 360 F.3d at 1030-32.

42 U.S.C. § 2000cc(a)(1)(A)-(B) (emphasis added).

Significantly, however, an RLUIPA claimant bears the burden of persuasion in establishing that a challenged zoning regulation does in fact "substantially burden" its religious exercise under this standard. *See, e.g., San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). A claimant may satisfy this requirement only by demonstrating that the ordinance at issue is "oppressive to a significantly great extent" such as to "impose a significantly great restriction or onus" upon religious exercise. *Id.* at 1034-35 (internal punctuation omitted). The strict judicial scrutiny required under RLUIPA is inapplicable absent this showing.

As the superior court correctly ruled, NUCC is unable to satisfy this demanding requirement with respect to the City's land use moratorium in the R-1 zoning district. [CP 480] Ordinance No. 419 simply prohibits NUCC from hosting a temporary encampment upon its *own* property during the moratorium's limited six month duration. It does not prevent NUCC from supporting, serving or hosting an encampment at alternative sites not governed by the City's moratorium. [VRP May 31, 2006 at 17:14-18] In this regard, the record clearly demonstrates that the moratorium covers only 36 percent of the City's total land mass. [VRP May 31, 2006 at 18:10-16] The wide availability of alternative sites to host and support Tent City 4, both within and beyond the City's territorial jurisdiction, is fatal to NUCC's RLUIPA theory.

On this point, the Ninth Circuit's *San Jose Christian College* decision, *supra,* controls the instant case and conclusively undermines NUCC's RLUIPA argument. *San Jose Christian College* involved a local government's denial of a site-specific rezone requested by a religiously affiliated applicant. *Id.* at 1027-29. In analyzing the adverse zoning decision under RLUIPA, the Ninth Circuit flatly rejected the contention that a "substantial burden" on religious exercise occurs simply because a religious landowner cannot conduct its desired activity *on a particular site*:

> [T]he City's regulations in this case do not render religious exercise effectively impracticable. As noted above, while the PUD ordinance may have rendered College unable to provide education and/or worship at the Property, *there is no evidence in the record demonstrating that College was precluded from using other sites within the city*. Nor is there any evidence that the City would not impose the same requirements on any other entity[.]

Id. at 1035 (emphasis added). *See also North Pacific Union Conference Ass'n of the Seventh-Day Adventists (NPUCASA) v. Clark County*, 118 Wn. App 22, 35-36, 74 P.3d 140 (2003) (rejecting church's claim that utilization of alternative, less desirable project sites would have coercive impact upon religious exercise under RLUIPA). Thus, the mere fact that NUCC is temporarily prohibited by local regulations from hosting an

encampment on the church's own property does not — in and of itself — constitute a "substantial burden" under RLUIPA.[10]

Courts have consistently rejected the contention that enforcement of neutral, generally-applicable zoning requirements — specifically including land use moratoria, *see, e.g., Sisters of St. Francis Health Services, Inc. v. Morgan County*, 397 F. Supp.2d 1032 (S.D. Ind. 2005); *Petra Presbyterian Church v. Village of Northbrook*, 409 F. Supp. 2d 1001 (N.D. Ill. 2006) — violates RLUIPA.[11] Because NUCC cannot demonstrate that the City's moratorium imposes a "substantial burden" upon its religious exercise, the church's "compelling interest" argument under RLUIPA fails as a matter of law.

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[10] That the church would potentially incur permitting delays by virtue of the application process for alternative sites is likewise insufficient to establish a substantial burden under federal law. "[T]he costs, procedural requirements, and inherent political aspects of the permit approval process [are] incidental to any high-density urban land use and thus [do] not amount to a substantial burden on religious exercise." *San Jose Christian College,* 360 F.3d at 1035 (citation and internal punctuation omitted).

[11] *See, e.g., The Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 406 F. Supp. 2d 507 (D.N.J. 2005) (ordinance prohibiting use of property within redevelopment zone as church did not violate RLUIPA); *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691 (E.D. Mich. 2004) (refusal to permit religious organization to demolish and replace facility did not violate RLUIPA); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003) (zoning ordinance prohibiting worship service in certain districts did not violate RLUIPA); *Williams Island Synagogue, Inc. v. City of Aventura*, 358 F. Supp. 2d 1207 (S.D. Fla. 2005) (denial of synagogue's conditional use application did not violate RLUIPA); *Williams Island Synagogue, Inc. v. City of Aventura*, 329 F. Supp. 2d 1319 (S.D. Fla. 2004) (under RLUIPA, court must consider all alternative options available to religious organization); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 111 P.3d 1123 (Or. 2005) (denial of church's application to build meetinghouse in residential neighborhood did not violate RLUIPA).

e. The City's moratorium does not violate the Washington Constitution

Contrary to NUCC's assertions, the City's moratorium also does not contravene the religious freedoms afforded under the Washington Constitution. NUCC's contention in this regard essentially parrots its First Amendment and RLUIPA theories — i.e., that by temporarily preventing a *particular* desired use of the church's property, the City has "burdened" NUCC's religious exercise and must justify its moratorium with a compelling government interest. [NUCC Brief at 31-33] The court should reject this tired argument and affirm the superior court's ruling.

Article I, Section 11 of the Washington Constitution provides for "freedom of conscience in all matters of religious sentiment, belief and worship." NUCC misconstrues this mandate as effectively exempting religiously owned property from local land use restrictions. [NUCC Brief at 31-33] But the State Constitution's religious freedom guarantee does not include "the right to be free of all government regulation." *North Pacific Union Conference Ass'n of the Seventh-Day Adventists (NPUCASA) v. Clark County*, 118 Wn. App 22, 31, 74 P.3d 140 (2003). Instead, it is well-established that "the government *can* require churches to comply with zoning ordinances[.]" *NPUCASA*, 118 Wn. App. at 32-33 (emphasis added).

Washington courts have developed a tripartite test to determine whether a governmental action impermissibly infringes upon religious rights protected by the State Constitution, examining:

> (1) whether the party claiming an infringement has a sincere religious belief; (2) whether the government action burdens the free exercise of a religious practice; and (3) *if so*, whether the burden is offset by a compelling state interest.

NPUCASA, 118 Wn. App. at 31-32 (emphasis added). Like the relevant First Amendment and RLUIPA standards, the "compelling interest" criterion under Article I, Section 11 applies *only* if a challenged regulation truly "burdens" the claimant's religious practice.

Notwithstanding the unchallenged sincerity of NUCC's convictions in desiring to assist the homeless, the church does not — and cannot — demonstrate that the City's land use moratorium cognizably burdens its religious exercise. Under the Washington Constitution, courts require "a very specific showing of hardship to justify exemption from land use regulations":

> A person who claims that the state has violated his right to religious freedom must show the coercive effect of the enactment as it operates against him in the practice of his religion. *The challenged state action must somehow compel or pressure the individual to violate a tenet of his religious belief.*

NPUCASA, 118 Wn. App. at 32 (citations and internal punctuation omitted) (emphasis added). At most, the City's R-1 moratorium has *temporarily* prevented NUCC from hosting a homeless encampment at *one location* within the City of Woodinville. But the church is wholly unable to demonstrate that the moratorium "compels" the NUCC congregation from assisting the homeless through monetary donations, sheltering them in individual congregants' homes, or establishing an encampment at other, alternative sites not covered by the moratorium. The inconvenience allegedly suffered by the church in this regard simply does not rise to the level of a constitutional deprivation.

The instant case is instead governed squarely by *North Pacific Union Conference Ass'n of the Seventh-Day Adventists v. Clark County. NPUCASA* involved the denial of a permit to construct a church's headquarters building in a zoning district which prohibited facilities of this type. *NPUCASA*, 118 Wn. App. at 26-27. The church challenged the decision, arguing that the permit denial violated the First Amendment, RLUIPA, and Article I, Section 11 of the Washington Constitution. *Id.* at 31-36. In rejecting the church's constitutional theories, the Court of Appeals flatly dismissed the contention that religious claimants may disregard local land use regulations — particularly if the claimant's

desired activity could occur through alternative means or at other locations:

> Although another site may not measure up to the proposed site's visibility and access, the question is whether building on another somewhat less desirable site will have a coercive effect on the Church or pressure church members to violate their religious tenets. The Church has simply not shown that it would.

NPUCASA, 118 Wn. App. at 33.

As these constitutional principles apply to the City's land use moratorium, "the question is not whether a religious practice is inhibited, but whether religious tenets can still be observed." *NPUCASA*, 118 Wn. App. at 33 (citation omitted). NUCC is free to assist the homeless through numerous alternative means, and may support, host or sponsor homeless encampments at any Woodinville location not subject to the current moratorium. Thus, as the *NPUCASA* court concluded and the superior court correctly ruled below, "the Church has not demonstrated that the [City's] action. . . . has or will prevent its members from observing their religious tenets." *Id.* at 33.

NUCC's reliance upon the Washington Supreme Court's historic preservation jurisprudence is misplaced. [NUCC Brief at 31-33 (citing

Munns v. Martin, 131 Wn.2d 192, 930 P.2d 318 (1997), *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 840 P.2d 174 (1992), and *First United Methodist Church of Seattle v. Hearing Examiner*, 129 Wn.2d 238, 916 P.2d 374 (1996))] Each of these cases was discussed at length in the Supreme Court's seminal *Open Door Baptist Church v. Clark County* decision, which unequivocally reaffirmed the application of nondiscriminatory zoning ordinances to religiously owned property. 120 Wn.2d at 155-61, 99 P.2d 33 (2000). Noting that the judiciary "should not invade the legislative arena or intrude upon municipal zoning determinations, absent a clear showing of arbitrary, unreasonable, irrational or unlawful zoning action or inaction," the *Open Door* court held that mandatory compliance with local land use regulations does not unconstitutionally "burden" a claimant's religious freedom as a matter of law. *Id.* at 161, 164-66 (citing cases). The Supreme Court expressly distinguished *Munns*, *First Covenant* and *First United Methodist*, concluding that "[t]he necessity or validity of zoning as an exercise of police power, something a bit more substantive than landmark preservation, cannot be in serious question." *Id.* at 167. NUCC's Article I, Section 11 argument fails accordingly, and should be rejected by this court.

6. <u>The Superior Court Erred By Applying Strict Scrutiny to the City's Moratorium Ordinance and Land Use Regulations</u>.

Notwithstanding the correct result reached by the superior court's June 12, 2006 Final Order, the court's ruling contained one distinct error of law. By applying "strict scrutiny" to the City's moratorium ordinance and land use regulations in Conclusion of Law 3.3, the superior court deviated from the correct legal standard. [CP 480]

Strict judicial scrutiny of local zoning regulations is appropriate under the Free Exercise Clause of the First Amendment only where the challenged ordinance is not facially neutral and generally applicable. *See San Jose Christian College*, 360 F.3d at 1030-31. "A law is one of neutrality and general applicability if it does not aim to infringe upon or restrict religious practices because of their religious motivation, and if it does not in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 1031. The moratorium imposed under Ordinance No. 419 clearly satisfies this standard, as it does not reference — much less target — religious practice. [Plaintiff's Exhibit No. 7]

Likewise, no "compelling interest" requirement applies under RLUIPA or Article I, Section 11 of the Washington Constitution unless the challenged regulation at issue cognizably "burdens" a claimant's religious exercise. *See, e.g. San Jose Christian College*, 360 F.3d at 1034-35; *NPUCASA*, 118 Wn. App. at 31-33. In the present matter, the superior court's Final Order expressly determined that the City's moratorium did *not* create any such burden. [CP 480] The court accordingly erred by applying strict scrutiny to Ordinance No. 419.

7. The TRO Allowing the Tent City Encampment on Church Property Issued Sua Sponte on May 12, 2006, was Issued Contrary to Washington Law. Each of the Several Orders Continuing the TRO through June 9, 2006 Were Issued In Error.[12]

Civil Rules R 65 allows a TRO on motion of a party supported by affidavit or by verified complaint demonstrating that immediate and irreparable injury, loss, or damage will result to the applicant. Washington law has established a tripartite standard for obtaining a temporary injunction:

> A party seeking relief through a temporary injunction must show a clear legal or equitable right, that there is a well-grounded fear of immediate invasion of that right, and that the acts complained of are have or will result in actual and substantial injury.

Rabon v. City of Seattle, 135 Wn.2d 278, 284, 957 P.2d 621 (1998); *Tyler Pipe Industries, Inc. v. Dept. of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

Appellants made no application for a TRO and did not make the required showing to the trial court. The City requested a TRO[13] seeking to *prohibit* the Appellants from locating on NUCC's property without the requisite permit. The *sua sponte* issue of the TRO allowing Tent City to

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[12] Woodinville's Motion and Supporting Declarations for Attorney Fees are included in the Supplemental Designation of Clerk's Papers filed with the Superior Court.

[13] The City's Motion for a TRO is included in the Supplemental Designation of Clerks Papers filed with the Superior Court.

locate on church property pending the hearing on preliminary injunction constitutes an abuse of the court's discretion under Civil Rule 65.

This error was compounded by the Orders issued by the trial judge during the hearing continuing the TRO through the oral decision granting the City's motion for preliminary and final injunctive relief. The motions made by Appellants for these orders were unsupported by any showing of a clear equitable or legal right to remain on the Church Property.

8. The Trial Court Erred in Denying the City's Motion For Attorney Fees When It Was Necessary to Obtain the Preliminary and Final Injunctive Relief to Extinguish the TRO.

The City is entitled to its reasonable attorney fees and costs because the hearing on preliminary injunction was combined with a motion to quash the TRO and was the only procedure available to the City to bring about the dissolution of the temporary injunction. The facts of this case fall squarely within the rule cited in the above two cases.

"Attorney fees are recoverable as a cost of dissolving a wrongfully issued temporary injunction or restraining order." Talmage, Philip A., Attorney Fees In Washington, Butterworth Legal Publishers, Issue 2, (1955), at page 278, citing *Alderwood Associates v. Washington Environmental Council*, 96 Wash.2d 230, 247, 635 P.2d 108 (1981); supra:

> ... In Cecil v. Dominy, 69 Wn.2d 289, 418 P.2d 233 (1966), the Court discussed the

> rationale for awarding attorney fees to parties who prevail in dissolving a wrongful injunction.
>
> Because the trial on the merits had for its sole purpose a determination of whether the injunction should stand or fall, **and was the only procedure then available to the party enjoined to bring about dissolution of the temporary injunction**, the case comes within the rule that a reasonable attorney's fee reasonably incurred in procuring the dissolution of an injunction wrongfully issue represents damages suffered from the injunction. (emphasis added)

69 Wn.2d at 291-292.

In *Ino Ino, Inc., v. Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154 (1997) the Washington Supreme Court reaffirmed that:

> ... On equitable grounds, a party may recover attorneys' fees reasonable incurred in dissolving a wrongfully issued injunction or restraining order. *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wash.2d 230, 247, 635 P.2d 108 (1981); *Cecil v. Dominy*, 69 Wash.2d 289, 291-92, 418 P.2d 233 (1966). **A temporary restraining order is "wrongful" if it is dissolved at the conclusion of a full hearing**. Id. at 293-94, 418 P.2d 233. (bold emphasis added)

The purpose of the equitable rule cited above is to deter a party from seeking relief prior to a trial on the merits. *Ino Ino, Inc. v. Bellevue* at 143, citing *White v. Wilhelm*, 34 Wn. App. 763, 773-74, 665 P.2d 407, review denied, 100 Wash.2d 1025 (1983). Appellants sought relief allowing them to maintain Tent City 4 on NUCC property by moving the encampment on to the church property prior to a judicial determination on

the merits and by making motions to continue the TRO through the conclusion of the hearing.

A party may recover attorneys' fees up to the date on which a wrongfully issued restraining order is dissolved. *Ino Ino, Inc. v. Bellevue* at 144. Here, it is impossible to segregate the legal expense of the City in obtaining the requested injunctive relief from the legal services necessary to dissolve the TRO. The theories for dissolution of the TRO and granting of the preliminary injunction are intertwined. One did not happen without the other. Attorney fees incurred prior to the trial court's dissolution of the temporary restraining order should be awarded by the Trial Court at by the Appellate Court.

D. CONCLUSION

The Court should affirm the decision of the Trial Court set forth in its Final Order of June 12, 2006, and overturn the Trial Court's denial of the City's Motion for Attorneys' Fees, dated July 18, 2006.

RESPECTFULLY SUBMITTED this 23rd day of October, 2006.

Respectfully submitted,

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By _____
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APPENDIX

Woodinville Municipal Code Provisions

Chapter 1.03

GENERAL PENALTY

Sections:

1.03.010 General penalties.

Unless otherwise specified by City ordinance, anyone who violates the provisions of any ordinance shall be punished pursuant to the general penalty provision set forth below:

(1) Criminal Penalty. Unless otherwise provided, any person violating any of the provisions of any ordinance of the City is guilty of a misdemeanor. Any person convicted of a misdemeanor under this code shall be punished by a fine not to exceed $5,000 or by imprisonment not to exceed one year, or by both such fine and imprisonment.

(2) Civil Penalty. Any person violating any of the provisions of any ordinance of the City which is designated a civil offense, shall have committed a civil infraction. Unless otherwise provided, any such person shall be assessed a monetary penalty not to exceed $250.00 for each day that the violation occurs. (Ord. 16 § 1, 1993)

1.03.020 Separate offense.

Every person violating any of the provisions of any ordinance of the City is guilty of a separate offense for each and every day during any portion of which the violation is committed, continued or permitted by any such person. (Ord. 16 § 2, 1993)

1.03.030 Nuisance.

In addition to the penalties set forth above, all remedies given by law for the prevention and abatement of nuisances shall apply regardless of any other remedy. (Ord. 16 § 3, 1993)

Chapter 1.05

DEFINITIONS

Sections:

1.05.010 Scope.

This chapter contains definitions of technical and procedural terms used in Chapters 1.06, 1.07, 1.08 and 1.09 WMC. (Ord. 350 § 1, 2003)

1.05.020 Definitions.

(1) "Abandoned vehicle" as used in all sections of this title means any abandoned vehicle, any abandoned automobile hulks and any other vehicle or parts thereof not defined as or amounting to abandoned vehicle or automobile hulk, whether on public or private property, whether or not so left with or without the permission of the property owner thereof.

(2) "Abandoned junk vehicle" or "junk vehicle" shall mean a vehicle meeting any two of the following:

(a) Is three years or older;

(b) Is extensively damaged, such damage including, but not limited to, any of the following: a broken window or windshield, missing wheels, tires, motor or transmission;

(c) Is apparently inoperable;

(d) Is without a valid, current registration plate;

(e) Has an approximate fair market value equal only to the approximate value of the scrap in it; and

(f) Excluding farm tractors and farm vehicles.

(3) "Code" shall mean the Woodinville Municipal Code.

(4) "Code Enforcement Officer" shall mean a person authorized to enforce the provisions of this title.

(5) "Dangerous machine" shall mean any machine that has the potential to cause serious bodily harm to any person.

(6) "Director" shall mean the City Manager, Director of Administrative Services, Director of Community Development (Planning), Director of Public Works, Director of Parks and Recreation or Permit Center Director, and his or her duly authorized representative(s), including the Code Enforcement Officer.

(7) "Discarded" shall mean cast off, thrown away or abandoned.

(iv) Greater than three offenses – $250.00.

(c) In addition to any penalty which may be imposed, any person violating or failing to comply with the applicable provisions of the Woodinville Municipal Code, unless otherwise provided in the code, shall make restitution for any and all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to the violation.

(d) The defendant may show the following as mitigating circumstances:

(i) That the violation giving rise to the infraction was caused by the willful act, or neglect, or abuse of another; or

(ii) That correction of the violation was commenced promptly upon receipt of the first notice of infraction, but that full and timely compliance was prevented by inability to obtain necessary materials or labor, inability to gain access to the subject structure, or other condition or circumstance beyond the control of the defendant.

(e) Special Penalties. The penalty schedule set forth in IRLJ 6.2(d) is hereby adopted by reference and incorporated herein as if set forth in full. (Ord. 350 § 3, 2003)

1.06.120 Reserved.
(Ord. 350 § 3, 2003)

1.06.130 Reserved.
(Ord. 350 § 3, 2003)

1.06.140 Stop work order.

(1) Whenever a violation of the Woodinville Municipal Code will materially impair the City's ability to secure compliance with the code, or when the continuing violation threatens the health, safety or welfare of the public, the Director may immediately issue a stop work order specifying the violation and prohibiting any work or other activity at the site. A failure to comply with a stop work order shall constitute a violation of this chapter.

(2) A notice of infraction may be issued in conjunction with, or for any violation of, a stop work order. (Ord. 350 § 3, 2003)

1.06.150 Emergency order.

Whenever any use or activity threatens the immediate health, safety and welfare of the occupants of a premises or any member of the public, the Director may immediately issue an emergency order directing that the use or activity be discontinued and the condition causing the threat to the public health and safety be corrected. The emergency order shall specify the time for compliance and shall be posted in a conspicuous place on the property, if posting is physically possible. Failure to comply with an emergency order shall constitute a violation of this chapter. Any condition described in the emergency order which is not corrected within the time specified is hereby declared to be a public nuisance and the City Manager, with the assistance of the City Attorney, is authorized to abate such nuisance summarily by any available legal means. The cost of such abatement shall be recovered from the owner or person responsible or both in the manner provided by law. (Ord. 350 § 3, 2003)

1.06.160 Additional relief.

(1) The provisions of this chapter are in addition to and not in lieu of any other penalty, sanction or right of action provided by law.

(2) The City may at any time seek legal or equitable relief to enjoin any acts or practices and seek to abate any condition which constitutes or will constitute a violation of the applicable provisions of the Woodinville Municipal Code and/or the City's Shoreline Master Program. (Ord. 350 § 3, 2003)

Chapter 1.07

CIVIL VIOLATIONS

Sections:

1.07.010 Definitions.

Definitions are set forth in Chapter 1.05 WMC. (Ord. 350 § 4, 2003)

1.07.020 Purpose.

The purpose of this chapter is to preserve the public health and the character and safety of the City's neighborhoods, rendering certain conduct unlawful. The violations set forth in this chapter may be enforced using any of the means set forth in this title. (Ord. 350 § 4, 2003)

1.07.030 Violations.

(1) It is unlawful to violate any applicable provision of the Woodinville Municipal Code.

(2) It is unlawful for any person to initiate, maintain or cause to be initiated or maintained the use of any structure, land or property within the City without first obtaining any and all permits or authorizations required for its use by the applicable provisions of the Woodinville Municipal Code and/or the City's Shoreline Master Program.

(3) It is unlawful for any person to use, construct, erect, enlarge, alter, repair, move, improve, convert, equip, occupy, maintain, locate, demolish or cause to be used, constructed, located, or demolished, any structure, land or property within the City in any manner that is not permitted by the terms of any permit or authorization issued pursuant to the applicable provisions of the Woodinville Municipal Code and/or the City's Shoreline Master Program.

(4) It is unlawful to:

(a) Remove or deface any sign, notice, complaint or order required by or posted in accordance with this chapter;

(b) Materially misrepresent any fact or information in any application, plan or other document submitted to obtain any permit or other authorization from the City;

(c) Fail to comply with any of the requirements of a stop work order or emergency order issued under this chapter;

(d) Fail to conform to the terms of a shoreline substantial development permit, conditional use permit, variance or other permit issued pursuant to the City's Shoreline Master Program, or undertake a development or use on shorelines of the State without first obtaining the necessary shoreline permits or approvals, or fail to comply with a cease and desist order issued pursuant to the City's Shoreline Master Program.

(5) Subdivision Violations. Any person or any agent of any person who violates any provision of Chapter 58.17 RCW or WMC Title 20, which relates to the sale, offer for sale, lease, or transfer of any lot, tract, or parcel of land, shall be subject to prosecution under this chapter for a gross misdemeanor. Each sale, offer for sale, lease or transfer of each separate lot, tract, or parcel of land in violation of any provision of Chapter 58.17 RCW or WMC Title 20 shall be deemed a separate and distinct offense.

(6) Shoreline Master Program Violations.

(a) Pursuant to RCW 90.58.210, the City may impose penalties for Shoreline Master Program violations in an amount not to exceed $1,000 for each violation. Each day of violation shall constitute a separate violation.

(b) Any person who, through an act of commission or omission, aids or abets in a violation shall be considered to have committed a violation for the purposes of the civil penalty.

(c) When a penalty is imposed jointly by the Department of Ecology and the City, it may be mitigated only upon such terms as both the Department and the City agree.

(7) It is unlawful for any person to discharge or allow to be discharged any contaminants into surface and storm water or ground water. Contaminants include, but are not limited to, the following:

(a) Trash or debris;

(b) Construction materials;

(c) Petroleum products including but not limited to oil, gasoline, grease, fuel oil, heating oil;

(d) Antifreeze and other automotive products;

(e) Metals in either particulate or dissolved form;

(f) Flammable or explosive materials;

(g) Radioactive material;

(h) Batteries;

(i) Acids, alkalis, or bases;

(j) Paints, stains, resins, lacquers, or varnishes;

(k) Degreasers and/or solvents;

(l) Drain cleaners;

(m) Pesticides, herbicides, or fertilizers;

(n) Steam-cleaning wastes;
(o) Soaps, detergents, or ammonia;
(p) Swimming pool backwash;
(q) Chlorine, bromine, and other disinfectants;
(r) Heated water;
(s) Domestic animal wastes;
(t) Sewage;
(u) Recreational vehicle waste;
(v) Animal carcasses;
(w) Food wastes;
(x) Bark and other fibrous materials;
(y) Collected lawn clippings, leaves, or branches;
(z) Silt, sediment, or gravel;
(aa) Chemicals not normally found in uncontaminated water;
(bb) Any other hazardous material or waste not listed above.

(8) It is unlawful to:
(a) Fail to maintain Erosion and Sedimentation Control (ESC) measures in a proper manner;
(b) Park any vehicle in the front yard, side yard or rear yard areas, except upon legally established driveways. (Ord. 350 § 4, 2003)

1.07.040 Nuisance section.

The following activities and conditions are unlawful:

(1) Owning, leasing, renting, occupying or having charge or possession of any property in the city, including vacant lots, except as may be allowed by any other city ordinance upon which exists any of the following:
(a) Junk, trash, garbage, litter, discarded lumber and/or salvage materials in front yard, side yard, rear yard or vacant lot, which is visible from the public right-of-way or other private property;
(b) Attractive nuisances dangerous to children including but not limited to the following items when located in any front yard, side yard, rear yard or vacant lot:
(i) Abandoned, broken or neglected equipment;
(ii) Potentially dangerous machinery;
(iii) Refrigerators and freezers and other appliances;
(iv) Excavations, wells or shafts that are not properly fenced or covered;
(c) Broken or discarded furniture or household equipment, in any front yard, side yard or vacant lot, which is visible from the public right-of-way or other private property;
(d) Graffiti on the exterior of any building, fence or other structure in any front yard, side yard, rear yard or on any object in a vacant lot, which is visible from the public right-of-way or other private property;
(e) Vehicle parts or other articles of personal property which are discarded or left in a state of disrepair in any front yard, side yard, rear yard or vacant lot, which is visible from the public right-of-way or other private property;
(f) Distribute or possess for the purpose of sale, exhibition or display, in any place of business from which minors are not excluded, any devices, contrivances, instruments, or paraphernalia which are primarily designed for or intended to be used for smoking, ingestion, or consumption of marijuana, hashish, PCP, or any controlled substance other than prescription drugs and devices. (Ord. 350 § 4, 2003)

1.07.050 Severability.

Should any section, subsection, paragraph, sentence, definition, clause or phrase of this title be declared unconstitutional or invalid for any reason, such decision shall not affect the validity of the remaining portion of this title. (Ord. 350 § 4, 2003)

used in this title shall have their customary meanings. (Ord. 175 § 1, 1997)

21.02.070 Interpretation – North American Industrial Classification System.

(1) All references to the North American Industrial Classification System (NAICS) are to the titles and descriptions found in the North American Industrial Classification System 1997 Edition, prepared by United States Office of Management and Budget which are hereby adopted by reference. The NAICS is used, with modifications to suit the purposes of this title, to list and define land uses authorized to be located in the various zones.

(2) The NAICS categorizes each land use under a general two-digit major group number, or under a more specific five- or six-digit industry group or industry number. A use shown on a land use table with a two-digit number includes all uses listed in the NAICS for that major group. A use shown with a five-digit or six-digit number includes only the uses listed in the NAICS for that industry group or industry, respectively, and the uses so listed are excluded from the respective major group.

(3) An asterisk (*) in the NAICS number column of a land use table means that the NAICS definition for the specific land use identified has been modified by this title. The definition may include one or more NAICS subclassification numbers, or may define the use without reference to the NAICS.

(4) The Planning Director shall determine whether a proposed land use not specifically listed in a land use table or specifically included within a NAICS classification is allowed in a zone. The Planning Director's determination shall be based on whether or not permitting the proposed use in a particular zone is consistent with the purposes of this title and the zone's purpose as set forth in Chapter 21.04 WMC, by considering the following factors:

(a) The physical characteristics of the use and its supporting structures, including but not limited to scale, traffic and other impacts, and hours of operation;

(b) Whether or not the use complements or is compatible with other uses permitted in the zone; and

(c) The NAICS classification, if any, assigned to the business or other entity that will carry on the primary activities of the proposed use.

(5) The decision of the Planning Director on an NAICS classification shall be final unless the applicant or an adverse party files an appeal to the Hearing Examiner pursuant to WMC 21.42.090. (Ord. 347 § 4, 2003; Ord. 175 § 1, 1997)

21.02.080 Interpretation – Zoning maps.

Where uncertainties exist as to the location of any zone boundaries, the following rules of interpretation, listed in priority order, shall apply:

(1) Where boundaries are indicated as parallelling the approximate centerline of the street right-of-way, the zone shall extend to each adjacent boundary of the right-of-way. Non-road-related uses by adjacent property owners, if allowed in the right-of-way, shall meet the same zoning requirements regulating the property owners lot;

(2) Where boundaries are indicated as following approximately lot lines, the actual lot lines shall be considered the boundaries;

(3) Where boundaries are indicated as following lines of ordinary high water, or government meander line, the lines shall be considered to be the actual boundaries. If these lines should change the boundaries shall be considered to move with them; and

(4) If none of the rules of interpretation described in subsections (1) through (3) apply, then the zoning boundary shall be determined by map scaling. (Ord. 175 § 1, 1997)

21.02.090 Administration and review authority.

(1) The Hearing Examiner shall have authority to hold public hearings and make decisions and recommendations on variances, reclassification, subdivisions and other development proposals, and appeals, as set forth in WMC.

(2) The Planning Director shall have the authority to grant, condition or deny applications for temporary use permits, conditional use permits, and renewals of permits for mineral extraction and processing, unless a public hearing is required as set forth in Chapter 21.42 WMC, in which case this authority shall be exercised by the Hearing Examiner.

(3) The City Building Official shall have authority to grant, condition or deny commercial and residential building permits, and clearing and grading permits in accordance with the procedures set forth in Chapter 21.42 WMC.

(4) Except for other agencies with authority to implement specific provisions of this title, the Planning Director shall have the sole authority to issue official interpretations of this title.

(5) The Planning Director is hereby authorized after July 14, 1997, to incorporate drawings as necessary for the purpose of illustrating concepts and regulatory standards contained in this title; provided, that the adopted provisions of the code shall control. (Ord. 175 § 1, 1997)

(g) Ground maintenance facilities; and

(h) Retail area is limited to 10 percent of the gross floor area, not to exceed 3,000 square feet regardless of gross floor area of the principal manufacturing use.

(2) Some accessory uses within the scope of this section may be defined separately to enable the code to apply different conditions of approval. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.013 Accessory use, residential.

Accessory use, residential:

(1) A use, structure, or activity which is subordinate and incidental to a residence including, but not limited to, the following uses:

(a) Accessory living quarters and dwellings;

(b) Fallout/bomb shelters;

(c) Keeping household pets;

(d) On-site rental office;

(e) Pools, private docks, piers;

(f) Antennas for private telecommunication services;

(g) Storage of yard maintenance equipment; or

(h) Storage of private vehicles, e.g., motor vehicles, boats, trailers or aircraft.

(2) Some accessory uses within the scope of this section may be defined separately to enable the code to apply different conditions of approval. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.014 Adjacent.

Adjacent: property that is located within 300 feet of a property line of a subject property. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.015 Adult use facility.

Adult use facility: an enterprise predominantly involved in the selling, renting or presenting for commercial purposes of books, magazines, motion pictures, films, video cassettes, cable television, live entertainment, performance or activity distinguished or characterized by a predominant emphasis on the depiction, simulation or relation to "specified sexual activities" as defined in this chapter for observation by patrons therein. Examples of such establishments include, but are not limited to, adult book or video stores and establishments offering panoramas, peep shows or topless or nude dancing. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.018 Agricultural crop sales.

Agricultural crop sales: the retail sale of fresh fruits, vegetables and flowers produced on-site. This use is frequently found in roadside stands or U-pick establishments and includes uses located in NAICS Major Group and Industry Group Nos.:

(1) 111 – Agricultural production-crops; and

(2) 44523 – Fruit and vegetable markets. (Ord. 375 § 2, 2004; Ord. 347 § 8, 2003; Ord. 175 § 1, 1997)

21.06.020 Agricultural products.

Agricultural products: items resulting from the practice of agriculture, including crops such as fruits, vegetables, grains, seed, feed, and plants, or animal products such as eggs, milk and meat. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.023 Aircraft, ship and boat manufacturing.

Aircraft, ship and boat manufacturing: the fabrication and/or assembling of aircraft, ships or boats, and including uses located in NAICS Industry Group Nos.:

(1) 33641 – Aerospace, and aircraft product and parts manufacturing;

(2) 541771 – Aircraft research and development in the physical engineering and life sciences;

(3) 48839 – Other support activities for water transportation;

(4) 33661 – Ship and boat building and repairing. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.025 Airport/heliport.

Airport/heliport: any runway, landing area or other facility excluding facilities for the primary use of the individual property owner which is designed or used by both public carriers or private aircraft for the landing and taking off of aircraft, including the following associated facilities:

(1) Taxiways;

(2) Aircraft storage and tie-down areas;

(3) Hangars;

(4) Servicing; and

(5) Passenger and air freight terminals. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.027 Alley.

Alley: an improved thoroughfare or right-of-way, whether public or private, usually narrower than a street, that provides vehicular access to an interior boundary of one or more lots, and is not designed for general traffic circulation. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997. Formerly 21.06.028)

and art supplies, including uses located in NAICS Industry Nos.:

(1) 451211 – Book stores;

(2) 45321 – Stationery stores;

(3) 453998 – Limited to art supply and architectural supply stores;

(4) 53223 – Video tape rental;

(5) 45122 – Record and prerecorded tape stores; and

(6) 45114 – Musical instrument stores. (Ord. 379 § 13, 2004; Ord. 375 § 2, 2004; Ord. 347 § 8, 2003; Ord. 175 § 1, 1997)

21.06.063 Broadleaf tree.

Broadleaf tree: a tree characterized by leaves that are broad in width and may include both deciduous and evergreen species. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.065 Buffer, critical area.

Buffer, critical area: a designated area contiguous to and protective of a critical area that is required for the continued maintenance, functioning, and/or structural stability of a critical area. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.068 Building.

Building: any structure having a roof. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.070 Building, hardware and garden materials store.

Building, hardware and garden materials store: an establishment engaged in selling lumber and other building materials, feed, and lawn and garden supplies, including but not limited to uses located in NAICS Major Group No. 444 – Building materials, hardware, garden supply. (Ord. 379 § 13, 2004; Ord. 375 § 2, 2004; Ord. 347 § 8, 2003; Ord. 175 § 1, 1997)

21.06.073 Building coverage.

Building coverage: area of a lot that is covered by the total horizontal surface area of the roof of a building. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.075 Building envelope.

Building envelope: area of a lot that delineates the limits of where a building may be placed on the lot. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.078 Building facade.

Building facade: that portion of any exterior elevation of a building extending from the grade of the building to the top of the parapet wall or eaves, for the entire width of the building elevation. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.080 Building Official.

Building Official: the manager of the City of Woodinville's Permit Center, or his or her designee. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.083 Bulk retail.

Bulk retail: an establishment offering the sale of bulk goods to the general public, including limited sales to wholesale customers. These establishments may include a variety of lines of merchandise such as: food, building, hardware and garden materials, dry goods, apparel and accessories, home furnishings, housewares, drugs, auto supplies, hobby, toys, games, photographic, and electronics. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.085 Calculated LOS.

Calculated LOS: a quantitative measure of traffic congestion identified by a declining letter scale (A – F) as calculated by the methodology contained in the 1985 Highway Capacity Manual Special Report 209 or as calculated by another method approved by the department. LOS "A" indicates free flow of traffic with no delays while LOS "F" indicates jammed conditions or extensive delay. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.087 Camouflaged.

Camouflaged: the use of shape, color, and/or texture to cause an object to appear to become a part of something else, usually a structure, such as a building, wall, or roof. Camouflaged does not mean "invisible," but rather "appearing as part or exactly like the structure used as a mount." (Ord. 375 § 2, 2004; Ord. 233 § 5, 1999)

21.06.088 Campground.

Campground: an area of land on which accommodations for temporary occupancy such as tents or recreational vehicles without hook-up facilities are permitted and which is used primarily for recreational purposes. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.090 Capacity, school.

Capacity, school: the number of students a school district's facilities can accommodate district-wide, based on the district's standard of service, as determined by the school district. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.093 Capital facilities plan, school.

Capital facilities plan, school: a district's facilities plan adopted by the school board consisting of:

(1) A forecast of future needs for school facilities based on the district's enrollment projections;

(2) The long-range construction and capital improvements projects of the district;

(3) The schools under construction or expansion;

(4) The proposed locations and capacities of expanded or new school facilities;

(5) At least a six-year financing plan component, updated as necessary to maintain at least a six-year forecast period, for financing needed school facilities within projected funding levels, and identifying sources of financing for such purposes, including bond issues authorized by the voters and projected bond issues not yet authorized by the voters;

(6) Any other long-range projects planned by the district;

(7) The current capacity of the district's school facilities based on the districts adopted standard of service, and a plan to eliminate existing deficiencies, if any, without the use of impact fees; and

(8) An inventory showing the location and capacity of existing school facilities. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.095 Cattery.

Cattery: a place where adult cats are temporarily boarded for compensation, whether or not for training. An adult cat is of either sex, altered or unaltered, that has reached the age of six months. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.098 Cemetery, columbarium or mausoleum.

Cemetery, columbarium or mausoleum: land or structures used for burial of the dead. For purposes of the code, pet cemeteries are considered a subclassification of this use. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.100 Church, synagogue or temple.

Church, synagogue or temple: a place where religious services are conducted and including accessory uses in the primary or accessory buildings such as religious education, reading rooms, assembly rooms, and residences for nuns and clergy, but excluding facilities for training of religious orders; including uses located in NAICS Industry No. 81311. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.101 City Tree Official.

City Tree Official: the Community Development Director or his/her designees responsible for implementing the Community Urban Forestry Plan and Regulations. The City Tree Official shall use the expertise of a certified arborist, under contract by the City, for technical advice on decisions related to the community urban forest. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.102 Civic center.

Civic center: a building or group of buildings containing administrative offices for the operation of local government that is:

(1) Owned and operated by the City of Woodinville; and

(2) That is used predominantly for office and meeting space for local government and/or for community activities. (Ord. 400 § 9, 2005)

21.06.103 Classrooms, school.

Classrooms, school: educational facilities of the district required to house students for its basic educational program. The classrooms are those facilities the district determines are necessary to best serve its student population. Specialized facilities as identified by the district, including but not limited to gymnasiums, cafeterias, libraries, administrative offices, and child care centers, shall not be counted as classrooms. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.105 Clearing.

Clearing: the limbing, pruning, trimming, topping, cutting or removal of vegetation or other organic plant matter by physical, mechanical, chemical or other means. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.108 Clustered development.

Clustered development: a method of locating residences close to each other on small lots. The purpose of clustering residences is to preserve tracts of open space including critical areas and to limit the location, cost and coverage of land by roads and utilities. (Ord. 379 § 11, 2004; Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.110 Cogeneration.

Cogeneration: the sequential generation of energy and useful heat from the same primary source or fuel for industrial, commercial, or residential heating or cooling purposes. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

year-round. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.635 Street.

Street: a public or recorded private thoroughfare providing the main pedestrian and vehicular access through neighborhoods and communities and to abutting property. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.636 Street banner.

Street banner: a temporary sign without mechanical or electrical devices made of cloth or similar nonrigid materials suspended with rope or cable over the public street right-of-way. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.638 Street frontage.

Street frontage: any portion of a lot or combination of lots which directly abut a public right-of-way. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.639 Street/utility pole.

Street/utility pole: telephone, utility/electric, cable television, or street light poles located within a public right-of-way. (Ord. 375 § 2, 2004; Ord. 233 § 16, 1999)

21.06.640 Structure.

Structure: anything permanently constructed in or on the ground, or over the water; including rockeries and retaining walls over four feet and signs, but excluding fences less than six feet in height and decks less than 18 inches above grade; or paved areas, and excluding structural or nonstructural fill. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.643 Student factor.

Student factor: the number derived by a school district to describe how many students of each grade span are expected to be generated by a dwelling unit. Student factors shall be based on district records of average actual student generated rates for new developments constructed over a period of not more than five years prior to the date of the fee calculation; if such information is not available in the district, data from adjacent districts, districts with similar demographics, or County-wide averages must be used. Student factors must be separately determined for single family and multifamily dwelling units, and for grade spans. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.645 Submerged land.

Submerged land: any land at or below the ordinary high water mark. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.647 Substantial damage.

Damage of any origin sustained by a structure whereby the cost of restoring the structure to its before-damage condition would equal or exceed fifty percent of the market value of the structure before the damage occurred. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.648 Substantial improvement.

Substantial improvement: any maintenance, repair, structural modification, addition or other improvement of a structure, the cost of which equals or exceeds 50 percent of the market value of the structure either before the maintenance, repair, modification or addition is started or before the damage occurred, if the structure has been damaged and is being restored. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.649 Temporary shelter.

Temporary shelter: a dormitory set up by an institution or nonprofit agency for the protection of homeless people on a temporary basis. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.650 Temporary use permit.

Temporary use permit: permit to allow a use of limited duration and/or frequency, or to allow multiple related events over a specified period. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.653 Tightline to a sewer.

Tightline to a sewer: a sewer trunk line designed and intended specifically to serve only a particular facility or place, and whose pipe diameter should be sized appropriately to ensure service only to that facility or place. It may occur outside the local service area for sewers, but does not amend the local service area. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

21.06.654 Traffic impact, direct.

Traffic impact, direct: any increase in vehicle traffic generated by a proposed development which equals or exceeds 10 peak hour, peak direction vehicle trips on any roadway or intersection. (Ord. 375 § 2, 2004)

21.32.040 Nonconformance – Abatement of illegal use, structure or development.

Any use, including structures, or other site improvement not established in compliance with use, development, setback, site, and design standards or critical areas and buffers in effect at the time of establishment shall be deemed illegal and shall be discontinued or terminated and subject to removal pursuant to the applicable provisions of the WMC. (Ord. 379 § 19, 2004; Ord. 175 § 1, 1997)

21.32.050 Nonconformance – Continuation and maintenance of nonconformance.

A nonconformance may be continued or physically maintained as provided by this chapter. (Ord. 175 § 1, 1997)

21.32.060 Nonconformance – Re-establishment of a discontinued nonconformance.

A nonconformance may be re-established as a nonconformance, except any nonconformance that is discontinued for a period of 12 continuous months shall be deemed abandoned and shall not be re-established. (Ord. 379 § 19, 2004; Ord. 175 § 1, 1997)

21.32.070 Nonconformance – Repair or reconstruction of nonconforming structure.

A damaged or partially destroyed nonconforming structure may be repaired or reconstructed; provided, that:

(1) The extent of the previously existing nonconformance is not increased;

(2) The building permit application for repair or reconstruction is submitted within 12 months of the occurrence of damage or destruction; and

(3) The structure has not been damaged or destroyed beyond 50 percent of its assessed value. (Ord. 175 § 1, 1997)

21.32.080 Nonconformance – Modifications to nonconforming structure.

Modifications to a nonconforming structure may be permitted; provided the modification does not increase the area, height or degree of an existing nonconformity. (Ord. 175 § 1, 1997)

21.32.090 Nonconformance – Expansion of nonconformance prohibited.

A nonconformance may not be expanded. (Ord. 175 § 1, 1997)

21.32.100 Temporary use permits – Uses requiring permits.

Except as provided by WMC 21.32.110, a temporary use permit shall be required for:

(1) Uses not otherwise permitted in the zone that can be made compatible for periods of limited duration and/or frequency; or

(2) Limited expansion of any use that is otherwise allowed in the zone but which exceeds the intended scope of the original land use approval. (Ord. 175 § 1, 1997)

21.32.110 Temporary use permits – Exemptions to permit requirement.

(1) The following uses shall be exempt from requirements for a temporary use permit when located in the CBD, GB, NB, TB, O or I zones when the use does not exceed a total of 14 days each calendar year:

(a) Amusement rides, carnivals, or circuses;

(b) Community festivals;

(c) Parking lot sales; and

(d) Fireworks stands, subject to the provisions of Chapter 8.03 WMC.

(2) Any use not exceeding a cumulative total of two days each calendar year shall be exempt from requirements for a temporary use permit.

(3) Any community event held in a public park and not exceeding a period of seven days shall be exempt from requirements for a temporary use permit.

(4) Any use of City-owned property authorized by a valid, written agreement executed by the City shall be exempt from the requirements for a temporary use permit.* (Ord. 370 § 4, 2004; Ord. 295 § 6, 2001; Ord. 175 § 1, 1997)7

*Code reviser's note: Section 5 of Ordinance 370, passed and effective August 23, 2004, and adding subsection (4) of this section, provides, "The code amendment established under Section 4 hereof is adopted as an interim regulation pursuant to RCW 35A.63.220 and RCW 36.70A.390, and shall sunset automatically six months after the effective date of this ordinance if not expressly extended by the City Council."

21.32.120 Temporary use permits – Duration and frequency.

Unless specified elsewhere in this chapter, temporary use permits shall be limited in duration and frequency as follows:

(1) The temporary use permit shall be effective for no more than 180 days from the date of the first event or occurrence;

(2) The temporary use shall not exceed a total of 60 days; provided, that this requirement applies only to the days that the event(s) actually takes place;

(3) The temporary use permit shall specify a date upon which the use shall be terminated and removed; and

(4) A temporary use permit shall not be granted for the same temporary use on a property more than once per calendar year; provided, that a temporary use permit may be granted for multiple events during the approval period. (Ord. 175 § 1, 1997)

Chapter 21.40

APPLICATION AND NOTICE REQUIREMENTS

Sections:

21.40.015 Applications – Requirements.

Application requirements shall be in accordance with the provisions of WMC 17.09.020. (Ord. 242 § 10, 1999; Ord. 175 § 1, 1997)

21.40.035 Vesting.

(1) A complete application for a land use, building, site development, grading, or sign permit shall be deemed vested at the date of submittal; provided, that such application meets all codes in effect at the time of submittal.

(2) Supplemental information required after acceptance and vesting of a complete application shall not affect the validity of the vesting for such application.

(3) Vesting of an application does not vest any subsequently required permits, nor does it affect the requirements for vesting of subsequent permits or approvals. (Ord. 242 § 10, 1999; Ord. 175 § 1, 1997)

21.40.070 Applications – Limitations on refiling.

Upon denial by the City Council of a zone reclassification or a special use permit, no new application for substantially the same proposal shall be accepted within one year from the date of denial. (Ord. 242 § 10, 1999; Ord. 175 § 1, 1997)

Chapter 21.42

REVIEW PROCEDURES

Sections:

21.42.010 Code compliance review – Actions subject to review.

The following actions shall be subject to administrative review for determining compliance with the provisions of this title and/or any applicable development conditions which may affect the proposal:

(1) Building permits;

(2) Grading permits; and

(3) Site development permits. (Ord. 242 § 11, 1999; Ord. 175 § 1, 1997)

21.42.020 Reserved.

(Ord. 175 § 1, 1997)

21.42.030 Planning Director review – Decisions and appeals.

(1) The Planning Director shall approve with conditions or deny permits based on compliance with this title and any other development conditions affecting the proposal.

(2) Planning Director decisions may be appealed to the Hearing Examiner pursuant to

WMC 17.07.030 and in accordance with Chapter 17.17 WMC.

(3) Permits approved through code compliance review shall be effective for the time periods and subject to the terms set out as follows:

(a) Building permits shall comply with Uniform Building Code as adopted by the City of Woodinville;

(b) Grading permits shall comply with Uniform Building Code as adopted by the City of Woodinville; and

(c) Temporary use permits shall comply with Chapter 21.32 WMC. (Ord. 175 § 1, 1997)

21.42.040 Planning Director review – Actions subject to review.

The following actions shall be subject to the Planning Director review procedures set forth in this chapter:

(1) Applications for conditional uses;

(2) Periodic review of extractive operations;

(3) Applications for home occupation and home industry permits; and

(4) Temporary use permits. (Ord. 242 § 11, 1999; Ord. 175 § 1, 1997)

21.42.050 Planning Director review – Notice requirements and comment period.

(1) The department shall provide published, posted and mailed notice pursuant to WMC 17.11.040 for all applications subject to Planning Director review.

(2) Written comments and materials regarding applications subject to Planning Director review procedures shall be submitted within 15 days of the date of published notice or the posting date, whichever is later. (Ord. 175 § 1, 1997)

21.42.060 Planning Director review – Decision or public hearing required.

Following the comment period provided in WMC 21.42.050, the Planning Director shall:

(1) Review the information in the record and render a decision pursuant to WMC 21.42.080; or

(2) Forward the application to the Hearing Examiner for public hearing, if:

(a) Adverse comments are received from at least five persons or agencies during the comment period which are relevant to the decision criteria of Chapter 21.44 WMC or state specific reasons why a hearing should be held; or

(b) The Planning Director determines that a hearing is necessary to address issues of vague, conflicting or inadequate information, or issues of public significance. (Ord. 175 § 1, 1997)

21.42.070 Planning Director review – Additional requirements prior to hearing.

When a hearing before the Hearing Examiner is deemed necessary by the Planning Director:

(1) Application processing shall not proceed until the supplemental permit review fees set forth in the WMC are received; and

(2) The application shall be deemed withdrawn if the supplemental fees are not received within 30 days of applicant notification by the Department. (Ord. 175 § 1, 1997)

21.42.080 Planning Director review – Decision regarding proposal.

(1) Decisions regarding the approval or denial of proposals (excluding periodic review of extractive operations) subject to Planning Director review pursuant to WMC 21.42.040 shall be based upon compliance with the required showings of Chapter 21.44 WMC. Periodic reviews of extractive operations shall be based upon the criteria outlined in WMC 21.22.050(2).

(2) Decisions shall be rendered pursuant to WMC 17.09.060. A comment period or public hearing may be reopened for the purpose of obtaining additional information.

(3) The written decision contained in the record shall be in accordance with WMC 17.15.080(3) and shall show:

(a) Facts, findings and conclusions supporting the decision and demonstrating compliance with the applicable decision criteria; and

(b) Any conditions and limitations imposed, if the request is granted.

(4) The Planning Director shall mail a copy of the written decision to the applicant and to all parties of record in accordance with WMC 17.09.060(2). (Ord. 175 § 1, 1997)

21.42.090 Planning Director review – Decision final unless appealed.

(1) The decision of the Planning Director shall be final unless the applicant or an adverse party files an appeal to the Hearing Examiner pursuant to Chapters 2.30 and 17.17 WMC.

(2) Prior to an appeal hearing by the Hearing Examiner, the Hearing Examiner shall mail notice of the appeal to parties of record and provide notice in accordance with WMC 17.17.040(1)(d) and (f).

(3) The Hearing Examiner shall review and make decisions based upon information contained in the written appeal and the record.

(4) The Hearing Examiner shall render a decision within 10 working days of the closing of hearing.

(5) The Hearing Examiner's decision shall be final unless appealed to Superior Court under the provisions of Chapter 2.30 WMC. (Ord. 175 § 1, 1997)

21.42.100 Hearing Examiner review – Zone reclassification, variances, special use permits and conditional use permits referred by the Planning Director.

Applications for zone reclassification, special use permits, variances and conditional use permits referred by the Planning Director shall be reviewed by the Hearing Examiner subject to the notice procedures set forth in Chapter 17.11 WMC and applicable criteria set forth in Chapter 21.44 WMC. (Ord. 175 § 1, 1997)

21.42.110 Hearing Examiner review – Decision final unless appealed or challenged.

(1) The decision of the Hearing Examiner regarding variances, special use permits and conditional use permits shall be final unless the applicant or an adverse party files an appeal to the City Council pursuant to Chapter 2.30 WMC and in accordance with Chapter 17.17 WMC.

(2) The decision of the Hearing Examiner regarding zone reclassifications shall be in the form of a recommendation to the City Council for passage of the appropriate ordinance. The Hearing Examiner shall hold the open record hearing pursuant to WMC 17.07.030, Project permit application framework (Type III).

(3) Prior to an appeal hearing by the City Council, the Planning Director shall mail a notice of the appeal or challenge to all parties of record pursuant to WMC 17.17.040(1)(f).

(4) The City Council's decision shall be final unless appealed to Superior Court under the provisions of Chapters 2.30 and 17.17 WMC. (Ord. 175 § 1, 1997)

21.42.120 Expiration.

(1) Land use decisions that have been reviewed and approved pursuant to WMC 21.42.040 and 21.42.110 shall expire within two years of approval, during which all construction of the project must be completed; provided, that conditional use approval for schools shall expire within five years.

(2) The expiration date may be extended one additional year by the Planning Director if, prior to the expiration date then in effect, the applicant demonstrates all of the following:

(a) That the applicant has made significant progress toward completion of the project;

(b) That failure to complete the project in a timely manner was beyond the applicant's control; and

(c) That expiration would cause the applicant to endure a significant financial hardship.

(3) For the purpose of this section, approval shall be the date the land use decision is approved, issued or granted by the Planning Director or the Hearing Examiner, whichever is later.

(4) This section shall apply retroactively to land use decisions approved pursuant to WMC 21.42.040 and 21.42.110 prior to December 14, 2002; provided, that for the purposes of determining the retroactive expiration date, the two-year period shall begin to run from December 14, 2002.

(5) This section shall not apply to zone reclassifications. (Ord. 326 § 14, 2002; Ord. 175 § 1, 1997)

21.42.130 Establishment of hearing rules.

The Hearing Examiner shall establish rules governing the conduct of public hearings before the Hearing Examiner and shall be in accordance with Chapters 17.15 and 17.17 WMC. (Ord. 175 § 1, 1997)

21.42.140 Records.

The Department shall maintain public records for all permit approvals and denials containing the following information:

(1) Application documents;

(2) Tape recorded verbatim records of required public hearing;

(3) Written recommendations and decisions for proposed actions;

(4) Ordinances showing final City Council actions;

(5) Evidence of notice;

(6) Written comments received; and

(7) Material submitted as exhibits. (Ord. 175 § 1, 1997)